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CIVIL CODE AMENDMENTS

Redhibition

Two bills were introduced in the 1974 legislative session to modify Civil Code articles relating to redhibition. One, amending article 2521,¹ was defeated on final passage in the House on the last day of the session;² the other, amending article 2531, was enacted even though it contains a reference to article 2521³ and makes little sense when read with the unamended text of the latter article.⁴ This inconsistency will surely cause difficulty in the application of the new legislation.

Formerly, article 2531 required the seller who was unaware of the redhibitory defects in an item to restore the price and certain other expenses to the buyer.⁵ Often if the defect were minor or easily repaired, an amicable solution to disputes between sellers and buyers could be reached by satisfactory repairs, eliminating any need for

1. Senate Bill 547, proposed to amend LA. CIV. CODE art. 2521, read as follows:

"Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices.

"A defect that can be remedied by adjustment, replacement or repair is not to be considered redhibitory unless the seller shall fail to remedy it after notice and after being given reasonable opportunity to remedy the defect so claimed at the seller's own expense. The notice shall generally state the alleged defect.

"If a buyer takes legal action to assert his rights under redhibition, the buyer shall be entitled to reasonable attorney's fees as an element of his recovery." OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE SENATE OF THE STATE OF LOUISIANA, 37th Reg. Sess., at 835 (June 19, 1974).

2. 1974 LEGISLATIVE CALENDAR OF THE STATE OF LOUISIANA, 37th Reg. Sess. 654.

3. LA. ACTS 1974, No. 673 § 1, amending LA. CIV. CODE art. 2531:

"The seller who knew not the vices of the thing is only bound to repair, remedy or correct the vices as provided in Article 2521, or if he be unable or fails to repair, remedy or correct the vice, then he must restore the purchase price, and reimburse the reasonable expenses occasioned by the sale, as well as those incurred for the preservation of the thing, subject to credit for the value of any fruits or use which the purchaser has drawn from it.

"In any case in which the seller is held liable because of redhibitory defects in the thing sold, the seller shall have a corresponding and similar right of action against the manufacturer of the thing for any losses sustained by the seller, and further provided that any provision of any franchise or manufacturer-seller contract or agreement attempting to limit, diminish or prevent such recoupment by the seller shall not be given any force or effect." (Emphasis added.)

4. LA. CIV. CODE art. 2521: "Apparent defects, that is, such as the buyer might have discovered by simple inspection, are not among the number of redhibitory vices."

5. LA. CIV. CODE art. 2531 formerly read: "The seller who knew not the vices of the thing, is only bound to restore the price, and to reimburse the expenses occasioned by the sale, as well as those incurred for the preservation of the thing, unless the fruits, which the purchaser has drawn from it, be sufficient to satisfy those expenses."

resort to the remedy of redhibition. However, the recent Louisiana supreme court decision of *Prince v. Paretti Pontiac Co.*⁶ held that a buyer need not prove a defect is difficult to repair nor allow his vendor an opportunity to repair the defective item as a condition precedent to his successful maintenance of a redhibitory action.⁷

The two bills amending articles 2521 and 2531 were submitted as a package designed primarily to reverse the *Prince* result. The draftsmen attempted to redefine redhibitory vices (those which give rise to a right in the purchaser to rescind the sale)⁸ to exclude not only apparent defects but also repairable defects. They proposed to do this by amending article 2521 so as to make such defects redhibitory only if the vendor did not or could not repair them after being given reasonable notice and opportunity to do so.⁹ Such an amendment would have left the buyer with no remedy should he choose to deny his vendor an opportunity to repair a claimed defect and would have afforded the vendor several possible defenses in any action brought to rescind the sale. Amendment of article 2531 was also proposed in order to delete the requirement of restoration of the price absent failure or inability to repair.

The now inappropriate reference to article 2521, however, was not deleted from the enacted amendment to article 2531 and a purely textual construction of the amended article might seem, when read in conjunction with unamended article 2521, to compel a seller who was unaware of the vices of the item to repair apparent defects.¹⁰ Although it is extremely unlikely that a vendor would be unaware of an "apparent" defect, such a construction would require the seller to restore the price or repair defects that article 2521 now excludes from the category of redhibitory vices. Surely no such radical change in the law was intended and the statute should not be interpreted so as to give it such a preposterous meaning.¹¹

Nevertheless, uncertainty remains as to whether passage of only half of the legislative package has accomplished its objective of forc-

6. 281 So. 2d 112 (La. 1973).

7. *Id.* at 116. See *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786, 790 (La. App. 4th Cir. 1973).

8. LA. CIV. CODE art. 2520.

9. See note 1 *supra*.

10. LA. CIV. CODE art. 2531 requires the vendor to repair defects "as provided in Article 2521." The latter article only defines apparent defects and excludes them from the category of redhibitory vices.

11. See *Dore v. Tugwell*, 228 La. 807, 84 So. 2d 199 (1955); *Stein v. Town of Lafitte*, 266 So. 2d 516 (La. App. 4th Cir. 1972).

ing the buyer to allow repair attempts¹² before suing for redhibition. No express obligation to allow repairs is placed on the vendee by the language of amended article 2531.¹³ Because the proposed amendment to article 2521 denying a purchaser the right to sue for redhibition on repairable defects was not enacted, it might be argued that the vendee retains the option of refusing to allow repairs; thus, he may still sue to rescind the sale¹⁴ and demand the return of the price because the vendor has "failed to repair"¹⁵ the defect. Such a construction would leave the *Prince* result unaltered.

Conversely, it can be argued that a change in the wording of a statute is intended to effect a change in result,¹⁶ as it is not to be presumed that the legislature would do a futile thing.¹⁷ The puzzling reference to article 2521 can be clarified if read in light of the apparent purpose demonstrated by the introduction of the companion bills.¹⁸ The intent of the package as introduced — to require buyers to allow reasonable repairs¹⁹ — could arguably be said to have been accomplished by amended article 2531 alone. The language "The seller . . . is only bound to repair, remedy or correct the vices as provided in Article 2521 . . ." ²⁰ seems to place the vendor under a

12. A detailed examination of the desirability of such a right to repair will not be contained in this discussion. For a strong argument for allowing the vendor opportunity to repair when dealing with complex machinery, see *Prince v. Paretti Pontiac Co.*, 262 So. 2d 826, 830 (La. App. 4th Cir. 1972) (Lemmon, J., concurring), *rev.d.*, 281 So. 2d 112 (La. 1973). UNIFORM COMMERCIAL CODE § 2—508 seems to provide the vendor with a reasonable opportunity to repair defects before the buyer may sue. See Mashaw, *A Sketch of the Consequences for Louisiana Law of the Adoption of "Article 2: Sales" of the Uniform Commercial Code*, 42 TUL. L. REV. 740, 789 (1968).

13. See note 3 *supra*.

14. LA. CIV. CODE art. 2520. The language including within redhibitory defects those which render the thing's use so inconvenient that the purchaser would not have bought it had he known of them seems the strongest support for allowing buyers to ask for redhibition on items with repairable defects. It can seldom be assumed that those who buy defective homes, cars, appliances, etc. would have bought such articles had they known of the defects, even though such defects might be correctible.

15. LA. CIV. CODE art. 2531, as amended by La. Acts 1974, No. 673 § 1.

16. See *La. Civil Serv. League v. Forbes*, 258 La. 390, 246 So. 2d 800 (1971); *State v. Wilson*, 204 La. 24, 14 So. 2d 873 (1943); *Stein v. Town of Lafitte*, 266 So. 2d 516 (La. App. 4th Cir. 1972); 1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 22.30 (4th ed. 1972) [hereinafter cited as SANDS].

17. See 2A SANDS § 45.12.

18. LA. CIV. CODE art. 18: "The universal and most effectual way of discovering the true meaning of a law, when its expressions are dubious, is by considering the reason and spirit of it, or the cause which induced the Legislature to enact it." See, e.g., *Melancon v. Mizell*, 216 La. 711, 44 So. 2d 826 (1950); *Doyal v. Roosevelt Hotel*, 234 So. 2d 510 (La. App. 4th Cir. 1970); 2A SANDS § 56.05.

19. See text at note 9 *supra*.

20. LA. CIV. CODE art. 2531, as amended by La. Acts 1974, No. 673 § 1.

clear duty to attempt repairs. As written, a more stringent obligation, *i.e.*, return of the price, is imposed upon him only if he fails or refuses. The buyer should not be allowed to hinder the seller from satisfying his statutory duties and, as a result, expose him to more onerous burdens.

If this approach is adopted by the courts, however, other questions will arise. The prescriptive period for suit expires within one year of the date of the sale if the vendor is in good faith (has no knowledge of latent defects);²¹ it is unclear whether the required repair attempts would suspend the running of the prescriptive period.²² A related question concerning the number of repair attempts the buyer must allow before the vendor has shown a failure or inability to correct the vices will probably be presented since sellers could easily abuse their new privilege.²³ Judicial guidelines for adequate notification of defects will also be needed.²⁴

Certainly the best way to resolve the problems created by the 1974 amendment is to enact new legislation to clarify the remedies available when the vendee refuses to allow repairs. Failure to adopt the complete package as proposed will perhaps cause the legislature to reconsider the conflicting interests of buyer and seller. Defeat of the amendment to article 2521 eliminated the provision for attorney's fees which had been added to the bill in committee.²⁵ Attorney's fees as an element of the damages recoverable in a redhibitory action against a vendor in good faith was perhaps the *quid pro quo* necessary to secure support for limiting the buyer's right to refuse repairs. Restoration of this provision and elaboration of guidelines for notification of defects and prevention of inordinate delays by sellers should be considered in any new legislation.

Amended article 2531 does contain some new provisions which can be enforced regardless of the interpretation given the right to repair clause. The vendor is clearly given the right to set off the value of the use which the buyer has derived from the item against the purchase price to be restored. Although the Code formerly mentioned

21. LA. CIV. CODE art. 2534.

22. *Delahoussaye v. Domingues Chevrolet, Inc.*, 137 So. 2d 356 (La. App. 3d Cir. 1962) (implying if seller undertakes repair, buyer may rely on such undertaking as suspension of prescription). See *Hermeling v. Whitmore*, 140 So. 2d 257 (La. App. 1st Cir. 1961) (where vendor-builder undertakes repairs, prescription is suspended and does not begin to run again until discovery that defects have not been remedied).

23. See Comment, 23 TUL. L. REV. 96, 111 n.105 (1948).

24. See the language of the proposed amendment to article 2521 declaring that "[t]he notice shall generally state the alleged defect." Note 1 *supra*.

25. See Senate Bill 547 in SENATE JOURNAL, *supra* note 1, at 835.

only a credit for the *fruits* drawn from the item,²⁶ recent decisions have allowed the vendor to claim credit for the use the buyer obtained from the defective article.²⁷ The amendment codifies that interpretation. The fair rental value of the item, taking into account its defective condition, must be determined by the court.²⁸

The second paragraph of the article²⁹ attempts to overturn a line of decisions holding that retailers may contractually waive or limit³⁰ their implied-in-law warranty from manufacturers against redhibitory defects.³¹ Contracts which would prevent the seller's recovery from the manufacturer of any losses sustained as a result of being held liable for redhibitory defects are now declared without force or effect. Recognizing the relative ease with which manufacturers could escape liability through such waiver clauses,³² the new legislation provides greater protection for the retailer which seemingly places him in a more favored position than the consumer. Louisiana courts still concede the possibility of a valid waiver by a consumer of the implied warranty,³³ but demonstrate a reluctance to give effect to such clauses by finding the provisions unenforceable for failure to

26. Compare note 3 *supra* with note 5 *supra*. A rule that the use of the price by the seller is equivalent to the use of the thing by the buyer was formulated in early cases to deny the vendor a set off for the use. See, e.g., *Harvey v. Kendall*, 2 La. Ann. 748 (1847); *Williams v. Daste*, 181 So. 2d 247 (La. App. 4th Cir. 1965); Note, 30 LA. L. REV. 508 (1970).

27. *Breaux v. Winnebago Indus., Inc.*, 282 So. 2d 763 (La. App. 1st Cir. 1973); *Gauche v. Ford Motor Co.*, 226 So. 2d 198 (La. App. 4th Cir. 1969); *Bergeron v. Mid-City Motors, Inc.*, 162 So. 2d 835 (La. App. 1st Cir. 1964); Note, 30 LA. L. REV. 508 (1970). See also *Prince v. Paretti Pontiac Co.*, 281 So. 2d 112 (La. 1973); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973) (implying approval of setoff if vendor requested).

28. See Note, 30 LA. L. REV. 508 (1970).

29. See note 3 *supra*.

30. LA. CIV. CODE art. 1764(2) (warranty may be excluded from sale by agreement). See, e.g., *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973); *Ingersoll v. Star Chrysler, Inc.*, 234 So. 2d 85 (La. App. 4th Cir. 1970); *Stumpf v. Metairie Motor Sales, Inc.*, 212 So. 2d 705 (La. App. 4th Cir. 1968).

31. *McCauley v. Manda Bros. Provisions Co.*, 252 La. 528, 211 So. 2d 637 (1968) (warranty of article 2520 applicable between manufacturer and retailer).

32. See *Anderson v. Bohn Ford, Inc.*, writ denied, 294 So. 2d 829 (La. 1974) (Barham, J., concurring) (questioning whether public policy should bar such contractual provisions); *Id.* (Tate & Calogero, JJ., dissenting) (rejecting enforcement of such contractual limitations where it would bar the retailer's recourse against the true wrongdoer, the manufacturer); *American Hoist & Derrick Co. v. Frey*, 127 La. 183, 53 So. 486 (1910); Note, 14 LOY. L. REV. 447 (1968).

33. E.g., *Radalec v. Automatic Firing Corp.*, 228 La. 116, 81 So. 2d 830 (1955); *Harris v. Automatic Enterprises, Inc.*, 145 So. 2d 335 (La. App. 4th Cir. 1962); Comment, 46 TUL. L. REV. 894 (1972).

adequately comply with certain judicially developed requirements.³⁴ Even the recently enacted federal legislation affecting consumer product warranties³⁵ will not give as complete protection against waivers to consumers as Louisiana now provides retailers.

The effect of this change on existing contracts is likely to be contested. Article 8 of the Civil Code forbids laws which have retrospective operation or which impair the obligations of contracts.³⁶ The jurisprudence endorses the presumption that provisions added by amendments affecting substantive rights are intended to operate prospectively.³⁷ Thus, this provision would be best construed as applicable only to contracts entered into subsequent to the article's effective date, although vendors subject to such clauses in present contracts might be able to negate their effect by demonstrating their unequal bargaining power in dealing with large manufacturers who force such waivers upon them.³⁸

Lease of Movables

As the leasing of movables has gained in commercial significance, provisions of the Civil Code³⁹ designed primarily to govern the lease of immovables⁴⁰ have not provided fully satisfactory solutions to the unique problems which arise when dealing with movables.⁴¹ Act 114 of 1974 adding R.S. 9:3261-71 enacts separate rules to govern these transactions.

34. *Prince v. Parette Pontiac Co.*, 281 So. 2d 112 (La. 1973); *Anderson v. Bohn Ford, Inc.*, 291 So. 2d 786 (La. App. 4th Cir. 1973).

35. Pub. L. No. 93-637, § 108 (Jan. 4, 1975). Disclaimers or modifications by suppliers (those who are engaged in the business of making consumer products directly or indirectly available) of any implied warranties to consumers are declared ineffective only if the supplier makes a written warranty or enters a service contract. An exception is made to permit a clearly stated limitation of the duration of the implied warranty to the "reasonable duration" of the accompanying written warranty.

36. See also U.S. CONST. art. I, § 10; LA. CONST. art. I, § 23.

37. *Succession of Lambert*, 210 La. 636, 28 So. 2d 1 (1946); *Shreveport Long Leaf Lumber Co. v. Wilson*, 195 La. 814, 197 So. 566 (1940); 1A SANDS § 22.36.

38. *Anderson v. Bohn Ford, Inc.*, 294 So. 2d 829 (La. 1974) (Barham, J., concurring) (proper showing could be made of forced waivers extracted from dealers).

39. LA. CIV. CODE arts. 2668-77.

40. The present Code articles, however, are applicable to lease of movables. LA. CIV. CODE arts. 2653, 2676, 2678. See, e.g., *Executive Car Leasing Co. v. Alodex Corp.*, 265 So. 2d 288 (La. App. 4th Cir. 1972); *Lyons v. Jahncke Serv., Inc.*, 125 So. 2d 619 (La. App. 1st Cir. 1960).

41. See Powers & McCowan, *Protections Available to a Lessor in a Louisiana Movable Lease Transaction*, 21 LA. B. J. 109 (1973). The Louisiana State Law Institute in its recommendation of this legislation pointed out that the remedies then available to the lessor were inadequate because such property was particularly subject to depreciation, damage, abuse and concealment.

Formerly, the lessor could either accelerate the future rentals (if the contract so provided) and sue for past due and future rent, or sue only for the past due rent and demand cancellation of the lease. If the lessor chose to sue for accelerated rentals, it had been held that the lessee could not be dispossessed prior to judgment,⁴² as the obligation to maintain the lessee in peaceable possession during continuation of the lease⁴³ applied to the lease of movables.⁴⁴ Even if the contract provided for both acceleration of the rent and seizure of the property prior to judgment, the courts would not enforce it since these remedies were said to be alternative and disjunctive.⁴⁵ Seizure prior to judgment was allowed only under the provisions of the Code of Civil Procedure article 4701 when the lessor limited his demand to recovery of the past due rent.⁴⁶

The new legislation allows the lessor a choice of enforcing all of his rights under the contract, including an acceleration clause, or cancelling the lease and exercising the rights provided under the new statutes.⁴⁷ If the latter course is chosen, the lessor may cancel the lease upon the lessee's default by giving written notice, after which the lessee is required to surrender possession within five days.⁴⁸ If the lessee fails to do so, the lessor must obtain a rule to show cause before surrender or seizure may be ordered.⁴⁹

Substantially more favorable to the lessor is the grant of the right to employ ordinary proceedings to enforce a contractual provision for liquidated damages at the same time or subsequent to the summary

42. *Mossy Enterprises, Inc. v. Piggy-Bak Cartage Corp.*, 177 So. 2d 406 (La. App. 4th Cir. 1965); *Bill Garrett Leasing, Inc. v. General Lumber & Supply Co.*, 164 So. 2d 364 (La. App. 1st Cir. 1964).

43. LA. CIV. CODE art. 2692(3).

44. *Duplantis v. Chauvin*, 182 La. 281, 161 So. 610 (1935); *Grant v. Emmons*, 69 So. 2d 157 (La. App. Orl. Cir. 1954).

45. *Henry Rose Mercantile & Mfg. Co. v. Stearns*, 154 La. 946, 98 So. 429 (1923); *Executive Car Leasing Co. v. Alodex Corp.*, 265 So. 2d 288 (La. App. 4th Cir. 1972). The lessor could regain possession after judgment was rendered for the unpaid rental, both past and future, by seizure and sale of the lessee's "right of occupancy." *Morrison v. Faulk*, 158 So. 2d 837, 840 (La. App. 4th Cir. 1963).

46. See *Powers & McCowan*, *supra* note 12, at 114 n.19, questioning the application of this provision to the lease of movables.

47. LA. R.S. 9:3261 (Supp. 1974).

48. LA. R.S. 9:3262-63 (Supp. 1974).

49. LA. R.S. 9:3264-65 (Supp. 1974). By affording the lessee an opportunity for a contradictory hearing on the rule within five to fifteen days and prior to seizure, and also providing an opportunity for a suspensive appeal of any seizure order, the new procedures should meet due process challenges. See *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

proceedings used to obtain possession of the movable.⁵⁰ To insure recovery, the court must find the amount provided to be reasonable; however, even if the amount is found unreasonable or if no such stipulation was included in the contract, the court has discretion to award damages to the lessor.⁵¹

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TRUST CODE REVISIONS

Legitime in Trust

Prior to 1974, the term of a trust could not exceed the life of the forced heir,¹ and the legitime could be burdened with an income interest in favor of anyone who could receive a usufruct over the same property.² Act 126 of 1974 amending sections 1841(3) and 1844 of the Trust Code provides explicitly that only a surviving spouse is eligible to receive an income interest or usufruct established by trust and states that the trust over the legitime may continue for the same term as would a usufruct over the same property.³ Since the testator may grant the surviving spouse a confirmed legal usufruct to last until remarriage or, if the surviving spouse remains single, for life,⁴ it would seem that an income interest may now also be granted for those

50. LA. R.S. 9:3266 (Supp. 1974).

51. LA. R.S. 9:3267 (Supp. 1974).

1. LA. R.S. 9:1841(3) (Supp. 1964) (as it appeared before Act 126 of 1974): "The legitime or any portion thereof may be placed in trust provided . . . [t]he term of the trust, as it affects the legitime, does not exceed the life of the forced heir"

2. LA. R.S. 9:1844 (Supp. 1964) (as it appeared before Act 126 of 1974): "The legitime in trust may be burdened with an income interest or with a usufruct in favor of a person other than the forced heir to the same extent that a usufruct of the same property could be stipulated in favor of the same person for a like period." Although the language of the section prior to the 1974 amendment could be read to allow an income interest in favor of any heir, legatee or assign, the cases had limited the usufruct over a legitime to one in favor of a surviving spouse. *See* Succession of Williams, 168 La. 1, 121 So. 171 (1929). An income interest over the legitime has also been so limited. Succession of Bellinger, 229 So. 2d 749 (La. App. 1st Cir. 1969).

3. LA. R.S. 9:1844 (Supp. 1964), *as amended* by La. Acts 1974, No. 126: "The legitime in trust may be burdened with an income interest or with a usufruct in favor of a surviving spouse to the same extent and for the same term that a usufruct of the same property could be stipulated in favor of the same person for a like period." *See also* comments to LA. R.S. 9:1841 (Supp. 1974).

4. *Winsberg v. Winsberg*, 233 La. 67, 96 So. 2d 44 (1957); Succession of Moore, 40 La. Ann. 531, 4 So. 460 (1888).